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Beccaria's Dream

On Criminal Law and Nodal Governance

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Introduction

Cesare Beccaria had a dream: a rationally constructed criminal law system would prevent citizens from harmful conduct and would create “the greatest happiness shared among the greater number” (Beccaria 1995: 7). Through clear laws and proportionate punishments this dream would come true. Unknown crimes, unfair trials and cruel punishments would belong to the past. Beccaria dreamt his dream in the 18th century, when Enlightenment had reached its highest point. Since this century, his rational desires are partially realized in many legal systems by means of statutory crimes, fair trials and sentencing practices based on principles which have developed over the past two centuries.

Yet his dream did not come true. In recent criminological literature it is argued that the state has lost its monopoly on the “governance of security”. Private companies, organizations and citizens try to protect their own security through “networked governance” or “nodal governance” (Johnston and Shearing 2003, Wood and Dupont 2006, Wood and Shearing 2007). The state is just a knot or “node” in the social network of the governance of security and the criminal law is no more than one of many instruments to protect the security of citizens and companies. Participants in the nodal governance are relatively less interested in the punishment of past conduct. The governance of security is mainly directed at reducing the risks of harmful conduct in the future. The punishment of crimes from the past can only be considered as an important state activity as long as it reduces the risks of future crimes.

The main reason Beccaria's dream did not come true may be found in the failure of the criminal law based on the rational principles of Beccaria's theory. The official publications of criminal laws and the proportionate punishments of crimes are not enough to protect the security of all citizens in an effective way. In the risk society, individuals and companies demand much more security than the state can offer by means of the criminal law. Therefore, they look for alternative means for the failing state. Companies hire their own security personnel or they contract security companies to protect their security in so called “mass private properties” (sport stadiums, amusement parks, shopping malls, office buildings), they cooperate to protect their security in “business improvement districts” and they hire specialized companies or create special departments to reduce harmful conduct like fraud and theft by personnel and clients. Citizens who can afford it, withdraw themselves in “gated communities” with private security provisions, or they develop their own strategies to protect security without the support of the state, for instance by surveillances of neighborhood watches and private alarms in their homes.

These social developments raise the question: what is left of Beccaria's dream? Are citizens still equally protected by the law and by fair trials and proportionate punishments? Beccaria's dream was founded on principles of equality, legality and proportionality. Are these principles still effectively in force under the nodal governance

of security? Beccaria's dream was also based on an instrumental theory of the effects of the criminal law: the concentration of power in the state monopoly on the criminal law is the most effective way to protect the security of all citizens in a fair and equal way. When these principles are abandoned, the effectivity and normativity of the governance of security become problematic: are the alternative arrangements of nodal governance capable of offering equal security to all citizens and are these arrangements effective in the sense that citizens are better protected than under the criminal law?

In this article I will presuppose that the shift from the state monopoly on the governance of security to the nodal governance of security indeed has taken place as some authors have argued, although this view has been met with criticism in criminological literature (Crawford 2006, Loader and Walker 2006, Loader and Walker 2007). I will investigate which consequences this shift can have for the Beccarian ideals concerning the effectivity and normativity of the criminal law. I will analyze the main points of the Beccarian theory on the normative foundations of the criminal law and the effectivity of the state monopoly on the governance of security by means of the criminal law.

Before I will go into Beccaria's dream, I will summarize the theory of Les Johnston and Clifford Shearing on the fall of the state monopoly and the rise of the nodal governance of security. Johnston and Shearing consider Beccaria as the representative theorist of the classical criminal law which has lost its monopoly on the governance of security. According to Johnston and Shearing, Beccaria's dream represents the punitive mentality of the classical criminal law, while the nodal governance of security is the expression of a risk mentality, which means that the nodal governance of security is mainly aimed at risk reduction and not at punishment of crime. Johnston and Shearing consider the punishing of past behavior as an instrument to reduce the risk of harm that is one of the many instruments of the risk society. They are aware of the normative and instrumental problems of the wavering of the state monopoly. Therefore, they are looking for effective alternatives which will satisfy certain normative demands.

Beccaria's dream can be used in the search for alternatives, because his dream contains the ideals of a just and effective governance of security. The classical state monopoly on the governance of security can only be lifted when the nodal alternatives meet the ideals of the Beccarian dream. In that sense his dream is still valid, though it cannot be fully realized by the criminal law. The alternative arrangements of nodal governance can be critically tested on the basis of Beccarian principles. When these arrangements cannot satisfy this critical test, that could be a reason to look for a more prominent place of the state in the governance of security to guarantee the Beccarian principles of equality, legality and proportionality.

Nodal governance

In their book *Governing Security* Les Johnston and Clifford Shearing argue that the state monopoly on the governance of security has been replaced by forms of networked governance in which the state, private companies and citizens work together to protect security. In the networks of governance the distinction between public and private forms of governance is blurred. The state itself is using forms of cooperation in which the state

hires private security companies to execute its tasks in protecting security. Citizens and companies use the services of the state, sometimes on a commercial basis, but these services have lost their privileged status in the sense that police activities are no longer considered as the main instruments to protect security. These activities are part of larger networks in which citizens and companies use a diversity of security instruments to protect themselves. They do not want to rely exclusively on state protection, but they want to organize their own governance of security. The state also uses a range of instruments and strategies which are primarily aimed at reducing security risks. The punishment of criminals is no longer the main instrument to protect the security of citizens and companies (Johnston and Shearing 2003: 13-18, 31-36, Shearing 2006).

Johnston and Shearing describe these developments in terms of security programmes. They make a distinction between the classical punitive program in which the criminal law has a central position and the modern risk program of nodal governance in which the state has lost its monopoly. According to Johnston and Shearing, a security program can be analyzed in terms of order, authority, institution, instrument, mentality and practice. A security program contains an order which determines what safe and unsafe conduct is. This order can be defined by an authority which has the power to announce the rules of order. Certain institutions execute the security program and use specific security instruments to enforce the rules of the program. From the definition of order by an authority and from the institutional enforcement of order a certain mentality can be deduced which is expressed in a practice of security governance (Johnston and Shearing 2003: 6-9).

The idea of a security program fits very well with the practice of the criminal law. According to Johnston and Shearing, this practice is the expression of a punitive mentality which can be deduced from the order of the criminal law en from institutions (police, prosecution, judiciary) which enforce the criminal law. The main instrument of these institutions is punishment (imprisonment, fine) which is executed in cases of crimes and misdemeanors. The punitive mentality is directed at behavior from the past. Criminal law institutions are mainly occupied with the investigation, prosecution and punishment of crimes which already have been committed. Punishment is determined by the seriousness of the crime and the personality of the perpetrator. Preventive considerations also play a part in the determination of punishment, and in that sense the punitive mentality is aimed at the future, but the main aspect of the criminal law is the fact that the institutions involved are handling crimes which have been committed and are in need of a state response (Johnston and Shearing 2003: 15, 24, 41, 48, 54, 95).

In contrast with the punitive program of classical criminal law the risk program of nodal governance is not primarily directed at the past, but mainly at the future: the reduction of harm risks. The criminal law can play a part in this reduction of risk, but the risk mentality of nodal governance implies that punishment is always too late, because the harm of crime already has occurred at the moment of punishment. Nodal governance is aimed at the reduction of harm and therefore risk instruments are aimed at prevention, for instance by way of exclusion of risk groups from certain city areas or the exclusion of these groups from certain services. Exclusion is one of the most important risk instruments expressing the risk mentality. The closed gate (with a camera to observe the person who wants admission) is the main instrument to control risk in buildings, business districts and gated communities. In a more abstract form the exclusion from services is

another means to control risk without the direct aid of the state (Johnston and Shearing 2003: 81-84).

Risk programmes are more hybrid than the classical punitive program, because of the lack of a clear order and a central authority which defines the rules, and because the main institutions and instruments of risk programmes are more difficult to identify in society. Citizens, companies and state organizations use a diversity of security instruments to reduce the risk of harm, without central authorities or binding rules which govern all the instruments used, like “risk taxation” or “risk management” as it is developed by private companies which have been growing in recent years and use these instruments to control the risk of harm. Private security companies have become the main competitors to the state in the governance of security (Johnston and Shearing 2003: 84-92).

Specific strategies are being presented by the state as classical forms of governance, for instance the strategy of *Zero Tolerance Policing* which is aimed at providing security in city areas. The state claims its successes with *Zero Tolerance Policing* on the basis of classical policing instruments like surveillance, but Johnston and Shearing argue that *Zero Tolerance Policing* is a form of cooperation between the state, private companies and citizens in which the state applies strategies aimed at risk reduction (Johnston and Shearing 2003: 98-116). *Zero Tolerance Policing* is not only directed at suspects of crimes, but also uses instruments like anti-social behavior orders and forms of preventive bodily searches. These instruments create the risk that innocent persons are the target of state interventions to reduce the risk of crime. The “anti-social behavior” is more broadly defined than the classical crimes of the criminal law and specific forms of surveillance can be used against persons belonging to risk groups without a formally defined suspicion that these persons have committed crimes.

Johnston and Shearing are aware of these problems, but they also analyze the positive effects of the loss of the state monopoly on the governance of security. They argue that as a consequence of this loss citizens can provide for their own security with the use of local knowledge and capacities. Johnston and Shearing give the South African Peace Committees as an example of these positive effects. This form of “local capacity policing” can be considered as the expression of a democratic ideal which holds that local conflicts are to be solved with local means and capacities and not with the use of state force (Johnston and Shearing 2003: 151-160).

Beccarian rationality

Johnston and Shearing mention the theory of Cesare Beccaria on the criminal law as an example of the punitive mentality which fits the classical monopoly of the state on the governance of security (Johnston and Shearing 2003: 42-45). According to Beccaria, punishment by the state is the main instrument to provide security. Beccaria was an Enlightenment thinker who developed his theory on crime and punishment as a protest against the abuse of the criminal law by the ruling sovereigns who furthered their own interests with state power and often acted against the interest of its citizens (Beccaria 1995: 3, 7-8, 9). Beccaria also protested against cruel treatment of suspects, unfair trials and harsh punishments. In his book *Dei delitti e delle pene* (*On Crimes and*

Punishments), published in Livorno (Italy) in 1764, Beccaria argued that persons have to transfer part of their natural freedom to the state in the interest of their security. The state could determine what the crimes are by clearly formulated laws. When violations of the laws would be met by proportional punishments, the security of all citizens would be better protected than in a state of nature in which persons have to take care of their own security.

Beccaria followed Thomas Hobbes in his opinion that the state of nature is a state of war of all against all (Hobbes 1996). Persons in the state of nature can end this war by means of a social contract on the transfer of freedom to the sovereign who will protect their security with the power that has been transferred to him (Beccaria 1995: 9, 11, 12). Beccaria disagreed with Hobbes on the amount of freedom which has to be transferred in order to end the war in the state of nature. According to Hobbes, persons have to transfer all their freedom, except for the natural right to self defense. Beccaria did not want to go that far. According to him, persons only had to transfer as much of their natural freedom as is necessary to protect their security. Beccaria also had a different opinion on the powers of the sovereign which are unlimited in Hobbes' political philosophy. Beccaria followed Montesquieu in the idea that the right of the sovereign to punish would not go further than is necessary to protect the security of all citizens. Beccaria also was of the opinion that a separation of powers was necessary to limit the power of the sovereign (Beccaria 1995: 10, 12-13).

Beccaria's book is especially well known for its protest against torture (Beccaria 1995: 39-44), its criticism of the death penalty (Beccaria 1995: 66-72), its arguments for publicly known laws which clearly state the crimes, and its reasoning in favor of proportionate punishments (Beccaria 1995: 19-21) and fair trials (Beccaria 1995: 97-98). Beccaria was an important propagandist for the modernization of the criminal law on the basis of Enlightenment principles. Beccaria also tried to improve the theory of the criminal law by arguing for a specific relation between rationality and normativity. He wanted to show that persons transfer a part of their natural freedom to the state to further their interest in security. The rationality of this transfer demands that individuals do not transfer more freedom than is necessary for the protection of their security.

Beccaria's arguments in favour of the rationality of the criminal law and the social contract relate to several levels of human reasoning. The first level concerns the human capacity to search for pleasure and to avoid pain. Certain crimes can give pleasure to the perpetrator and therefore the punishment of the crime has to cause more pain than the pleasure of the crime (Beccaria 1995: 9, 21). People are motivated to act on direct impulses of their senses and therefore prompt punishment would be the most effective instrument against crime. Individuals are also capable of weighing the short term pleasure of crime against the long term pain of future punishment. The time between the direct pleasure of crime and the pain of future punishment cannot last too long, because otherwise individuals would not make a psychological association between crimes and punishments (Beccaria 1995: 49). This is a second level of reasoning in Beccaria's theory. Beccaria added a third level of rationality to the first two levels. Individuals can reason on a higher level of abstraction when they make decisions on the basis of written laws which determine what are the crimes and punishments. This third level can only function when the laws are clearly stated and publicly known (Beccaria 1995: 17-18). To this third level of reasoning a fourth level can be added which Beccaria himself did not mention

explicitly. It is only possible to understand the meaning of the law when a person understands the political and legal system of which the law is a part. A person has to know the meaning and function of the sovereign, the laws, the crimes, the prosecution and the judiciary within the system in order to be able to weigh the pleasure of crime against the pain of punishment.

With the social contract, Beccaria added a fifth level of rationality to his theory. The social contract presupposes the ability of individuals to rationally compare the state of nature with the state under the rule of the sovereign. According to Beccaria, individuals will make this comparison on the basis of their rational self-interest and they will be able to measure the amount of freedom they will have to transfer to the sovereign in order to protect their security in an effective way. This fifth level of rationality raises certain problems, because Beccaria not only formulated a social contract theory, but he also used utilitarian criteria to evaluate the acts of the sovereign. Beccaria thought that individuals in the state of nature or under the rule of the sovereign will not reason on the basis of the utilitarian principle to promote “the greatest happiness shared among the greatest number” (Beccaria 1995: 7). They will only act on the basis of self-interest. This raises the problem that on the basis of their own interest, individuals may not comply with the law, while at the same time it is in their own interest that everybody else does (Beccaria 1995: 10). A possible solution to this problem is rational self binding through the social contract and the criminal law of the sovereign. The punishment of individuals who do not comply with the criminal law gives everybody a reason not to commit crimes. Parties to the social contract should be able to see the rationality of this reasoning and also should be able to limit their freedom on the basis of this reasoning. This adds a sixth level of reasoning to the five levels mentioned before. The sixth level is the theoretical level on which individuals are able to formulate a solution to the problem of the contradiction between contractual self interest and utilitarian common good.¹

On the basis of Beccaria’s theory, individuals can be divided in six categories. Some individuals can only reason on the first level of rationality in reaction to direct forms of pleasure and pain. Other individuals can reason on a second level and compare direct forms of pleasure and pain with future ones. A third category consists of individuals who are able to reason on the basis of the laws defining crimes and punishments. On a fourth level of abstraction, individuals can understand the political and legal system of which the laws and the punishment are a part. Some individuals are able to compare the state of nature with the state of the sovereign and the ability to make this comparison is the fifth form of rationality. The highest level of rational abstraction consists of reasoning to solve the contradiction between self interest and social utility. A person who is able to reason on the six levels of rationality has strong reasons not to commit crimes. According to the theory of Beccaria, a society of individuals with the ability to reason on all six levels of rationality will be a society with maximum security and maximum freedom, provided that the state will function effectively and will promptly and proportionally punish transgressions of the criminal law.

Beccarian explanations of crime

Beccaria's theory on the rationality of individuals can explain why a rationally constructed criminal law would be effective when the criminal law system would comply with principles of equality, legality and proportionality. When all citizens are capable of reasoning on the six levels of rationality, and when all crimes are clearly defined by the law and are promptly and proportionally punished by the state, the criminal law would make Beccaria's dream on effectivity and normativity come true. The Enlightenment ideal of Beccaria was that all citizens can reach the six levels of rationality by upbringing and education (Beccaria 1995: 110, 105-107). According to the Enlightenment dream, the criminal law can provide security for all rational citizens, while the citizens transfer no more freedom than is necessary to protect their security. Punishment would infringe the freedom of citizens no more than is necessary, including the freedom of the perpetrators who would be punished proportionally. When citizens can reach all six levels of rationality, limitations on freedom by punishments will only be necessary in exceptional cases. The need of those limitations will increase when citizens cannot reach all six levels, but can only reason on the lower levels.

Beccaria's theory can explain why the criminal law would not effectively protect security in certain circumstances. The explanation can be found in a failing state which cannot react promptly with proportionate punishments on all committed crimes. Because of this failure, an essential part of Beccaria's theory of the social contract would become inoperative: even the most rational citizen will only comply with the criminal law when the threat of punishment effectively wipes out the pleasure of the crime. When punishment does not follow promptly after the crime, a reason to comply with the criminal law disappears, although it cannot be excluded that a fully rational person would comply to the law even when he knows that punishment will not follow promptly.²

The explanation of crime can also be found in the failed reasoning of citizens who are not capable to react adequately on punishments of crimes and the threat of punishments in the criminal laws. When these two explanations are combined, the criminal law could end in a complete failure according to Beccaria's theory. When the state cannot react promptly to crime with proportionate punishment and citizens are not capable of reasoning rationally - even on the lower levels of rationality - crime rates would rise and society would degenerate towards a state of nature. The failing rationality of individuals could be caused by inadequate education or by social or psychological problems of perpetrators. This could be handled by other instruments than the criminal law, for instance programmes of reintegration based on social and psychological knowledge and therapeutic treatment.³ The failure of the state could be repaired by improving the criminal law system and its effectivity by punishing promptly to provide security for all citizens.

It is also possible that Beccaria's theory is ill-founded or incomplete and that other explanations can be given for the rising crime rates and the failing criminal law system: political, economic and cultural explanations such as those given by David Garland in his book *The Culture of Control* (Garland 2001). These explanations are based on more general developments in society. The social and economic equality or inequality can be an explanation for the crime rates of a society. In her book *The Prisoner's Dilemma*, Nicola Lacey argues that egalitarian societies react less harshly towards crime than societies with great economic differences without social welfare. A causal

relationship may exist between crime rates and the equal or unequal distribution of wealth (Lacey 2008).

Perhaps it is possible to amend Beccaria's theory on crime and punishment which can be considered as an incomplete theory. Beccaria's theory only deals with the distribution of freedom and security. A complete theory of crime would also deal with the distribution of other primary social goods and the relation of this distribution with the criminal law system. A starting point of such a criminal law theory could be *A Theory of Justice* in which John Rawls defends a general theory of the social contract (Rawls 1999). In a society that is just according to the Rawlsian principles of justice, citizens would not have a reason to commit crimes to further their own interests.⁴ When a society does not meet up completely with the Rawlsian principles of justice, individuals would have more reason to commit crime, especially when they are the victims of injustice. Crime rates could be explained by the *relative deprivation* of individuals who are the worst off in a relatively unjust society, as Jock Young has argued in his book *The Exclusive Society* (Young 1999). Punishment of crime would have the effect of strengthening the feeling of injustice of those who are being punished when the primary social goods are unequally and unfairly distributed in society. This explanation would add a seventh level of rationality to Beccaria's theory.⁵

It is possible that Beccaria's theory, amended with a seventh level of rationality, does not give the correct explanation of crime rates, because his theory does not correspond with the way human beings take decisions on committing crimes and the way punishments have an effect on these decisions. It may be possible that individuals generally do not decide to commit crimes after reasoning according to Beccarian models of rationality (or more modern theories of rational choice). Other personal and social factors determine the crimes people commit and the way society reacts to those crimes, for instance emotional and cultural factors which fall outside the scope of rational reasoning. I will not raise further doubts on Beccaria's theory on rationality. My purpose in this article is to look for Beccarian explanations of crime and punishment and Beccarian explanations of alternatives to the criminal law, such as the rules, authorities, institutions, instruments, mentalities and practices of nodal governance. The next step would be to test these explanations empirically, but to be able to do that, it must be shown that nodal governance does not necessarily presume a completely different theory in comparison to Beccaria's theory of the criminal law.

Beccarian explanations of nodal governance

When the state fails to provide the necessary security for all, individuals to a certain extent fall back into a state of nature in which they have to provide for their own security. Therefore, the rise of nodal governance could be explained and justified by the Beccarian theory that the social contract is only effective and binding when everybody's security is better protected under the criminal law than in the state of nature. When individuals are worse off under the criminal law, they can use other social and legal instruments to protect their own security as an alternative or an amendment to the Beccarian social contract.

This would mean that individuals can reason according to the six or seven levels of Beccarian rationality in relation to the institutions and instruments of nodal governance. Beccarian reasoning would lead to the conclusion that individuals cannot completely depend on the criminal law of the state to provide their security. According to Beccaria's social contract theory, individuals do not transfer all their freedom to the state. They transfer no more freedom than is necessary for the protection of their security. When the transfer of freedom does not have the desired effect, the Beccarian social contract allows for individuals to withhold a part of their freedom in order to protect their own security with legal and social instruments other than the criminal law.

From the perspective of Beccaria's theory, nodal governance appears to be an *intermediate state* between the state of nature and the monopoly on the use of force by the sovereign. Individuals not only have a choice between the state of nature and the criminal law: they also can choose the instruments of nodal governance. There are gradual differences between the state of nature, the intermediate state of nodal governance and the criminal law of the state. From Beccaria's theoretical perspective the question must be: how much freedom does a person have to transfer to the state in order to provide the necessary security and how much freedom does a person have to withhold to protect his own security? The answer to this question can be based on a Beccarian balancing of freedom and security to reach a maximum security with a minimum loss of freedom.

In his book *Anarchy, State, and Utopia* Robert Nozick argued that individuals in a state of nature do not immediately have to transfer all their freedom to the state through a social contract (Nozick 1974). They can use their freedom in the state of nature to start protection agencies on the basis of private contracts. Nozick aimed to illustrate that the state could rise out of a free market of private protection agencies in the form of a dominant protection agency or a federation of protection agencies. With this reasoning, it could also be argued that the free market would not necessarily result in one dominant agency, but in a range of protective possibilities in which the state exists alongside other forms of protection companies. They can offer private instruments to protect security, from alarm installations to surveillance services and security personnel. The Beccarian social contract could regulate certain instruments of security, like the criminal law and its institutions, on which the state has a monopoly. The social contract could also provide for the freedom to protect security through private arrangements. To a certain extent the parties to the social contract could reserve a part of their freedom for private security arrangements. The amount of freedom transferred or reserved could be based on a rational calculation of the optimum effects of the transference.

In this context the question can be raised what the status of freedom is in the intermediate state of nodal governance. Johnston and Shearing claim that no set of nodes can be given conceptual priority in a network-based approach to governance. They argue that the exact nature of governance is a matter of empirical enquiry (Johnston and Shearing 2003: 147). This point of view has been the object of critical debate in criminological literature. According to some authors, the state still has a central place in the governance of security, although the state does not provide for all instruments of security. The central place of the state has taken the form of "anchored pluralism" in which the state is the final authority on all instruments of security provided by state

institutions, private companies and citizens (Loader and Walker 2006, Loader and Walker 2007: 170-194).

Johnston and Shearing presuppose the possibility of the use of contract and property as instruments of security. The protection of “mass private properties” and “gated communities” is partly based on the rights of the owners of these properties and their freedom of contract. In a modern state, however, the right to property is not a natural right, but it is defined and regulated by the state and its laws.⁶ Property rights are protected by the state in order to allow private owners to exercise these rights. The possibility to exercise these rights presupposes the existence of the state and the laws of the state which regulate private property.⁷

These laws also contain limitations on property rights, for instance the limitation that the owner of private property does not have the right to punish individuals who violate his property rights in the way the criminal law system can punish perpetrators. The owner of private property has the right to exclude individuals from the use of his property and to arrest violators and hand them over to the state in order to punish the perpetrators. These rights and limitations are defined by the laws of the state. When an owner transgresses these laws, he or she can become the subject of state force through private or public proceedings.

Freedom of contract is also a right defined by the laws of the state.⁸ Contracts are regulated by laws and these laws also mark the boundaries of the freedom of contract. According to private law, it is not possible to regulate the use of force by private contract. The use of force falls under the monopoly of the state as it is defined by private and public law. It is allowed to contract with private companies on surveillances, but it is not allowed to contract with these companies on the arrest, trial and imprisonment of individuals in order to protect private property.⁹

From the perspective of the Beccarian theory, the state monopoly on the criminal law could be amended with additional instruments to protect the security of individuals and private companies. These instruments, like the freedom of contract and property rights, are also defined and limited by the law of the state, first of all by the monopoly of the state on the use of force, which excludes certain forms of coercion on the basis of private property or private contracts. The private law of the state regulates the legal powers of property owners and the freedom of contract on the security market.

Nodal governance can be analyzed as an *amendment* to the Beccarian theory of the social contract. The intermediate state of nodal governance can be placed between the Beccarian state which provides for security through the criminal law and the state of nature in which everybody has to provide for their own security in a war of all against all. Most instruments of nodal governance, like private contracts and property rights, presume the existence of the state, its monopoly on the use of force, and the laws of the state which regulate and limit private contracts and property rights.

The Beccarian theory on the social contract is *incomplete* because Beccaria thought that the criminal law is the only instrument to protect security. His theory of rational choice, however, suggests that individuals have more instruments from which to choose than just the criminal law. They can use their freedom to protect their security and they can make provisions in the social contract to reserve a certain amount of freedom to maximize the protection of security. The free market of private security is limited and

protected by the state monopoly on the use of force. On this point the free market of security differs from the state of nature where such a monopoly does not exist.

From the point of view of Beccaria's theory, the question can be asked whether private security arrangements are effective in comparison with the security offered by the criminal law and whether these arrangements comply with the principles of equality, legality and proportionality. The order of the risk program in nodal governance is not as clearly stated as the criminal law, the instruments in the form of exclusive measures can be disproportionate in relation to the unwanted behaviour, and the effects of private arrangements can lead to inequality in the protection of security. Individuals and companies who can afford it, can effectively protect their security in gated communities or business improvement districts, while individuals who lack the financial means have to live in "no go areas" which resemble the Hobbesian state of nature. A consequence of nodal governance could be the growth of unsafe areas which may work to everybody's disadvantage.¹⁰ A possible solution to this problem could be state intervention in unsafe areas to protect citizens who cannot pay for their security or state subsidy of private arrangements for those who cannot pay them. Taxing the rich to finance security for the poor could also be a solution (Johnston and Shearing 2003: 111).

The best solutions according to Beccarian reasoning depend on the six or seven levels of rationality and on the possibilities of the criminal law and the private arrangements to offer effective protection. The solutions finally depend on a rational balancing of freedom and security and this balancing could lead to the conclusion that individuals should be able to use their freedom to protect their security instead of transferring their freedom to the state and the criminal law. But this reasoning also presupposes the existence of the state as the highest authority to define and limit property rights and contract rights. A rational theory of the social contract should not only describe the monopoly of the state on the use of force, but also the private freedoms of citizens and companies to protect their own security, based on provisions in the social contract and the laws of the sovereign state.

Conclusion

Both the theory on nodal governance as formulated by Johnston and Shearing, and the theory of Beccaria on the criminal law fall short of explaining private arrangements to protect security. Johnston and Shearing fail to see that private contracts and property rights are legal concepts which presuppose the existence of the state and its laws on property and contract. Johnston and Shearing have to clarify their use of concepts like "the authority of contract" and "mass private property" in relation to private law and the state monopoly on the use of force.¹¹ Beccaria did not take into account the possibility that individuals can use their freedom to protect their security under the rule of private law. Beccaria's theory on the rationality of individuals can be used to argue that individuals must have the possibility to look for a balance between private freedom to protect security and public protection by the criminal law of the state.

The Beccarian theory on the social contract can be amended with provisions on the private arrangements of individuals to protect security. These provisions can be constructed on the basis of the Beccarian principles of equality, legality and

proportionality, and also on the basis of the six or seven levels of Beccarian rationality. Johnston and Shearing also seem to reason from the rational interests of individuals in the protection of security. These interests could be specified in a theory on the rational choices between the different instruments and on the implementation of the Beccarian principles.¹²

It cannot be excluded, however, that Beccaria's dream can no longer be a source of inspiration. In that case, alternative theoretical frameworks have to be developed to explain and justify nodal governance and the diminishing of state governance: individuals are not rational in accordance with Enlightenment ideals, the state cannot meet the Enlightenment expectations of effectivity and normativity, and the free market of security has replaced the state monopoly on the governance of security. It could be disputed that this replacement is really an ideal situation. This intermediate state could also be a consequence of a failing society in which rich people retire in their "gated communities", while those who cannot pay for their security, have to live in the "no go area's" with a strong resemblance to the Hobbesian state of nature. As long as this situation is considered to be a state of avoidable failure, the Beccarian dream is still alive.

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¹ The complex relation between social contract theory and utilitarianism in Beccaria's theory is analyzed by Young 1983. On a more general level this relation is the subject of Hudson 2003.

² For instance a person with the rationality of Socrates who realizes that he himself suffers the most harm of the crimes he will commit (Plato 1994: 46 e.f. and 78 e.f.)

³ Johnston and Shearing point out that after Beccaria the punitive program was adapted in the "neoclassical compromise" of criminal punishment and therapeutic reintegration (Johnston and Shearing 2003: 45-48). David Garland has called this adaption "penal welfarism" (Garland 2001: 27 e.f.).

⁴ See on the complex relation between rationality and justice Rawls 1999: 450 e.f.

⁵ See on the moral problem of crime and punishment in an unjust society Reiman 2007 with references to Rawls and to Hobbes en Locke who according to Reiman defend opposing conclusions on the moral status of crime in an unjust society. This explains the ambivalence in the title of his article.

⁶ The same problem occurs in Nozick 1974. He presupposes property rights and contract rights without the existence of a state. Given the complexity of these rights, it is problematic to suppose that they can be defined as natural rights without laws defining them. The complications of defining property rights may be a reason of its own to enter a social contract and to transfer ruling powers to the state.

⁷ This point was already argued by Rousseau in his social contract theory (Rousseau 1997: Book I, Chapter 8 and 9).

⁸ Crawford calls contractual governance "regulated self-regulation" (Crawford 2003: 488). He points out the risks of exclusion and inequality of contractual governance (501). An important gain can be the fact that contractual governance is voluntary, in contrast to the punitive coercion of the state. The voluntary character of contractual governance can make room for restorative justice (502).

⁹ Johnston and Shearing call "the authority of contract" an alternative to "state-granted coercive powers" (Johnston and Shearing 2003: 17). They add that "the state can be called upon to use force in support of contracts and their property claims", but they also state that "the governance of security is authorized through a variety of different, albeit related, auspices". The legal powers of private person to make contractual rules on the governance of security, however, presuppose the existence of the state which regulates the right to property and the freedom of contract. See on these and related problems of nodal governance Loader and Walker 2007: 188-190 and 192-194.

¹⁰ Johnston and Shearing call the private areas of security "new feudal domains" with "private corridors" running over the unsafe areas, for instance in the form of bridges or underground pathways between the safe areas (Johnston and Shearing 2003: 110).

¹¹ Shearing seems to acknowledge this point when he accepts concepts like "rule at a distance" en "state-anchored pluralism" (Shearing 2006: 24). But he denies the possibility of a conceptual priority of the state on the basis of "conceptual claims". He argues that priority in nodal governance is an empirical matter (27, see also Johnston and Shearing 2003: 147). Shearing, however, does not make clear what the status of concepts like contract and property is. It seems to be impossible to define these concepts only empirically, without any reference to their legal meaning which conceptually presupposes the existence of a state and a legal system.

¹² Beccaria's theory of rational choice could be amended with ideas from modern rational choice theory and (neo)liberalism. The seventh level of rationality, which is absent in his theory, suggests that rational decisions on the distribution of security in society should take into account the equal moral worth of persons. Rawlsian rationality could be taken as a model of the way decisions on this seventh level should be taken. See Rawls 1999: 123 e.f. on the rationality of persons in his theory.